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In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS REESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1977. A petition for rehearing was denied on January 13, 1978. The petition for a writ of certiorari was filed on February 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an instruction that knowledge of being under indictment is an element of an offense under 18 U.S.C. 922(h)(1), which proscribes receipt of a firearm while under indictment for an offense punishable by imprisonment in excess of one year.

2. Whether Congress exceeded its power under the Commerce Clause in dealing with shotguns in 18 U.S.C. 922(h).

STATUTE INVOLVED

18 U.S.C. 922(h)(1) provides in pertinent part:

> It shall be unlawful for any person—
>
> (1) who is under indictment for * * * a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of knowingly receiving a firearm while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(h)(1).[1] He was sentenced to pay a fine of $750. The court of appeals affirmed (Pet. App. 1-4).

1. The evidence at trial showed that on October 31, 1974, petitioner purchased a Remington 12-gauge shotgun from a store in Los Angeles (Pet. App. 1; Tr. 175, 187). He had previously been indicted on October 11, 1972, on four counts of willful evasion of income tax, in violation

[1]A count charging petitioner with knowingly making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6), was dismissed at the close of the evidence (Tr. 227). "Tr." refers to the trial transcript.

of 26 U.S.C. 7201,[2] and had been released on bail pending trial (Pet. App. 1; Tr. 92). At the present trial, petitioner acknowledged that he realized that his tax case was pending, but he testified that he did not know the meaning of "indictment" and that he had not read the form (ATF Form 4473) that customarily accompanies the purchase of a firearm (Pet. App. 1; Tr. 176-178). Petitioner also admitted that he had been indicted several times previously; he stated, however, that he thought the indictment lapsed after he posted bail, even though he realized that he still had to stand trial (Pet. App. 4; Tr. 191-192, 197-200).

Petitioner then asked the district court to instruct the jury that he had to know that he was under indictment at the time of purchase in order to be convicted under Section 922(h)(1). The court declined to give the instruction, and petitioner was convicted (Pet. App. 2-4).

The court of appeals affirmed. The court first noted (Pet. App. 2-3) that "[t]echnically, no challenge to the instructions is properly before us because no transcript has been received showing either the instructions given or the requests refused. * * * It is the duty of counsel to see that the record is complete."[3] On the merits, the court indicated its view (*id.* at 3) that "the government does not have to prove scienter." The court did suggest, however, that after hearing testimony concerning a defendant's understanding about the continuing effects of an

[2]Persons convicted of violating 26 U.S.C. 7201 are subject to imprisonment for not more than five years.

[3]The court of appeals did not have the transcript of the trial court's jury instructions, for petitioner failed to have them transcribed (Pet. App. 2-3). We have secured a transcript and have lodged a copy with the Clerk of this Court. The trial court, over objection, refused to instruct that knowledge was an element of the offense; instead, it made no mention of the issue (Inst. Tr. 9, 27-28).

indictment, "the trial judge should fashion a proper instruction, if one is requested * * *" (*id.* at 4). But the court concluded: "[O]n this record there is no proper request, and clearly no basis for a reversal" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 4-9) that the trial court should have instructed the jury that a defendant cannot be convicted under Section 922(h)(1) unless he knows that he is under indictment at the time of purchase of a firearm. We believe that the court of appeals correctly rejected that contention on the particular facts of this case.

At the outset, we note that the court of appeals was required to decide this case on an incomplete record. Because petitioner had not had the jury instructions transcribed, the record below reflected no request by him for the instruction he now insists upon. This defect may be significant for purposes of determining whether this Court should undertake review of the issue petitioner presents; although the court of appeals admonished that upon proper testimony "the trial judge should fashion a proper instruction, if one is requested," it went on to declare that "on this record there is no proper request, and clearly no basis for a reversal" (Pet. App. 4). It is not clear, therefore, that the Ninth Circuit would uphold the refusal to give an instruction in a proper case where a sufficient record was presented.

It is also unclear that petitioner was entitled to any instruction at all on the question of *scienter*. While we believe that Section 922(h)(1), sensibly read, requires knowledge by a defendant that he has been placed under indictment and would not reach someone never informed of an indictment against him, petitioner has never disputed his knowledge of that fact. Rather, he contends that a gun purchaser must know that he is still under

indictment at the time of the firearms transaction, thus allowing him to plead a subjective mistake of law or fact in defense to the charge. This is a very different matter, for Congress may rationally have concluded that where the dangers of gun possession are high and the imposition on individual prerogatives relatively light, it is appropriate to require that persons informed they are under indictment act at their own risk while the indictment has legal effect. The Ninth Circuit has noted that a comparable section of the Gun Control Act of 1968, 18 U.S.C. App. 1202 (a), "makes possession the offense and does not require *scienter*." *United States* v. *Crow*, 439 F. 2d 1193, 1195, vacated and remanded on other grounds, 404 U.S. 1009.

Despite petitioner's contrary contention (Pet. 4-6), there is no palpable conflict between the Ninth and Sixth Circuits on the *scienter* requirement. The Sixth Circuit has agreed with the Ninth Circuit in *Crow* that Section 1202(a) "makes possession the offense and does not require *scienter*." *United States* v. *Thomas*, 484 F. 2d 909, 915, certiorari denied, 414 U.S. 912. Although the Sixth Circuit did hold that a defendant whose felony indictment had apparently been dismissed in open court was entitled to a *scienter* instruction (*United States* v. *Renner*, 496 F. 2d 922), that court later stated that the *Renner* rule "should be confined to the facts of that case." *United States* v. *Barrett*, 504 F. 2d 629, 634, affirmed, 423 U.S. 212.[4] Moreover, the opinion of the Ninth Circuit below indicates that a *scienter* instruction in such a case, if properly requested, might be appropriate (Pet. App. 4). Thus, we do not believe that review by this Court is necessary at the present time.

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[4]Under the unusual circumstances of the *Renner* case, the result may have been justified upon the alternative ground that the defendant there was not "under indictment" within the meaning of Section 922(h)(1).

2. Petitioner also contends (Pet. 9-11) that 18 U.S.C. 922(h) cannot be applied to shotguns without exceeding Congress' power under the Commerce Clause. Petitioner does not dispute the power of Congress to regulate the flow of handguns, automatic weapons, or explosives because of the grave danger their abuse poses to our society (Pet. 10-11); he argues only that the congressional Findings and Declaration in the Gun Control Act of 1968 (Section 101, 82 Stat. 1213-1214, 18 U.S.C. 921 note) exempts shotguns because they are firearms "appropriate to the purpose of hunting, trapshooting, * * * or any other lawful activity * * *" (*ibid.*). This argument, however, takes too limited a view of Congress' power under the Commerce Clause and misconceives the purpose for the inclusion of shotguns within the statute.

To begin with, it is well-established that Congress may impose criminal sanctions for the purpose of regulating even purely intrastate activities, where the cumulative impact of that class of activities substantially affects interstate commerce. *Perez* v. *United States*, 402 U.S. 146; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241. Moreover, where the class of activities is regulated and that class is within the reach of federal power, courts may not "'excise, as trivial, individual instances' of the class." *Perez* v. *United States, supra*, 402 U.S. at 154 (citation omitted). Congress has properly found that there is widespread trafficking in firearms "moving in or otherwise affecting interstate or foreign commerce" (Section 901(a)(1) of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 225-226). The purpose of the Gun Control Act of 1968 was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency" (S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

It is plain that Congress intended the Gun Control Act to remedy the failure of Title IV of the Omnibus Crime Control and Safe Streets Act to include shotguns and rifles within its proscriptions. The House Report on the Act (H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968)) stated: "First, the instant measure imposes restrictions on rifles and shotguns generally parallel to those that [Title IV] imposed on handguns only." The relevant Senate Report (S. Rep. No. 1501, *supra*, at 22) observed: "The firearms abuse problem has been partially met with enactment of title IV to the Omnibus Crime Control and Safe Streets Act of 1968; however, the task has not yet been completed, for that title did not contain the needed controls over rifles and shotguns."[5]

It was entirely rational for Congress to include shotguns within the Act. A shotgun or rifle was used in nearly 30 percent (or over 2,000) of the yearly murders committed by use of a firearm at the time the statute was enacted. H.R. Rep. No. 1577, *supra*, at 8. Moreover, murder made up only a fraction of the crimes in which firearms, including shotguns, were utilized. *Id.* at 7. In these circumstances, the regulation of the receipt of shotguns by persons indicted for or convicted of a felony falls clearly within the permissible bounds of the

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[5]While Congress did not intend "to place any *undue or unnecessary* Federal restrictions or burdens on *law-abiding citizens* with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity * * *" (Section 101, 82 Stat. 1213-1214, 18 U.S.C. 921 note (emphasis added)), it thus did not entirely exempt shotguns from the coverage of the Act. A shotgun is a "firearm" within the meaning of the Act (18 U.S.C. 921(a)(3)), though it is generally not a "destructive device" (18 U.S.C. 921(a)(4)(B)). The Act itself makes plain at several points that shotguns fall within its scope. See, *e.g.*, 18 U.S.C. 922(b)(1), (3).

commerce power. See *Scarborough* v. *United States*, 431 U.S. 563, 569-571; *United States* v. *Haddad*, 558 F. 2d 968, 973 (C.A. 9); *United States* v. *Rosenbarger*, 536 F. 2d 715, 718 (C.A. 6), certiorari denied, 431 U.S. 965; *Mandina* v. *United States*, 472 F. 2d 1110, 1113-1114 (C.A. 8), certiorari denied, 412 U.S. 907; *United States* v. *Nelson*, 458 F. 2d 556, 559 (C.A. 5); *Stevens* v. *United States*, 440 F. 2d 144, 151-152 (C.A. 6); cf. *Huddleston* v. *United States*, 415 U.S. 814, 824, 833.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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